

McNAIR & SANFORD, P.A.

ATTORNEYS AND COUNSELORS AT LAW

MADISON OFFICE BUILDING/SUITE 400
1155 FIFTEENTH STREET, NORTHWEST
WASHINGTON, DC 20005

TELEPHONE 202/659-3900
FACSIMILE 202/659-5763

CHARLESTON OFFICE
140 EAST BAY STREET
POST OFFICE BOX 1431
CHARLESTON, SC 29402
TELEPHONE 803/723-7831
FACSIMILE 803/722-3227

COLUMBIA OFFICE
NATIONSBANK TOWER
1301 GERVAIS STREET
POST OFFICE BOX 11390
COLUMBIA, SC 29211
TELEPHONE 803/799-9800
FACSIMILE 803/799-9804

DOCKET FILE COPY ORIGINAL

GEORGETOWN OFFICE
121 SCREVEN STREET
POST OFFICE DRAWER 418
GEORGETOWN, SC 29442
TELEPHONE 803/546-6102
FACSIMILE 803/546-0096

GREENVILLE OFFICE
NATIONSBANK PLAZA
SUITE 601
7 NORTH LAURENS STREET
GREENVILLE, SC 29601
TELEPHONE 803/271-4940
FACSIMILE 803/271-4015

RALEIGH OFFICE
RALEIGH FEDERAL BUILDING
ONE EXCHANGE PLAZA
SUITE 810
POST OFFICE BOX 2447
RALEIGH, NC 27602
TELEPHONE 919/890-4190
FACSIMILE 919/890-4180

SPARTANBURG OFFICE
SPARTAN CENTRE/SUITE 306
101 WEST ST. JOHN STREET
POST OFFICE BOX 5137
SPARTANBURG, SC 29304
TELEPHONE 803/542-1300
FACSIMILE 803/522-0705

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JUN 14 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

To: Administrative Law Judge
Walter C. Miller

)
)
) MM Docket No. 93-107
)
)
) File Nos. BPH-911230MA
)
)
) through
)
) BPH-911231MB
)

CONSOLIDATED REPLIES TO OPPOSITIONS
OF THE MASS MEDIA BUREAU

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____

Stephen T. Yelverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th Street, N.W., Suite 400
Washington, D.C. 20005
Telephone: (202) 659-3900

June 14, 1993

B:SEARCY65.FCC

CONSOLIDATED REPLIES TO OPPOSITIONS OF THE MASS MEDIA BUREAU

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.229 (d) and 1.294 (c) of the Commission's Rules, hereby submits its consolidated replies to the oppositions of the Mass Media Bureau ("Bureau"). ORA filed on May 17, 1993, motions to enlarge the issues against Shellee F. Davis ("Davis"), Wilburn Industries, Inc. ("Wilburn"), ASF Broadcasting Co. ("ASF"), David F. Ringer ("Ringer"), and Kyong Ja Matchak ("Matchak").

These motions raise similar issues. The Bureau filed oppositions to the motions on June 2, 1993. In Order, FCC 93M-336, released June 7, 1993, the Presiding Judge dismissed as moot the Bureau's opposition to the motion to enlarge issues against Matchak because of the dismissal with prejudice of her application. In support of its consolidated replies, ORA submits the following comments.

Section 73.316 Issues

In its motions to enlarge, ORA seeks the specification of Section 73.316 issues against Davis and ASF. They both propose the use of directional antennas. Section 73.316 (c) requires that such applicants provide in their construction permit application a complete description of the proposed directional antenna system, including the manufacturer and model number of the directional antenna. This sub-section specifically states that it is not sufficient to label the proposed antenna with a generic term and that a specific model number must be provided. Neither Davis nor ASF complied with this unambiguous requirement.

use of directional antennas. Therefore, Section 73.316 (c) by its own terms applies to their construction permit applications.

The Bureau cites to no published Commission decision or statement authorizing this highly unusual "practice," or to any public document which an applicant could reasonably claim reliance upon. Indeed, there are none. The Bureau appears to be engaging in post hoc rationalization.

The Bureau has no legal authority to ignore the Commission mandated requirements of Section 73.316 (c). It is required to faithfully follow Commission Rules and policies. See, Section 0.283 (b); RKO General, Inc. v. FCC, 670 F.2d 215, 223-224 (D.C. Cir. 1981). The Bureau can not unilaterally and arbitrarily decide which Commission Rules and policies will be followed and which will be ignored.

Although it may be defensible for the Bureau in the context of unopposed applications to delay the submission of required information, it is indefensible for the Bureau to ignore the mandate of Commission Rules in the context of a comparative hearing. The purpose of a hearing is to determine whether the competing applicants are in strict compliance with Commission Rules before grant of the construction permit, not after grant!

ORA has been seriously prejudiced by the failure of Davis and ASF to include in their construction permit applications the model numbers for their proposed directional antennas. Only by having this information can ORA determine whether the proposals of Davis and ASF will actually comply with the stringent requirements for directional antennas. Each different model directional antenna has different propagation characteristics. There is nothing generic about directional antennas.

Section 73.215 Issues

In its motions to enlarge, ORA seeks the specification of Section 73.215 issues against Ringer and Davis. Ringer concedes in his application that he will have prohibited contour overlap with Station WTTF-FM, Tiffin, Ohio. Davis

refused to state in her application whether her proposed directional antenna will protect the contours for Station WTTF-FM.

The Bureau acknowledges in its opposition with respect to Ringer, at page 2, para. 3, that he will have prohibited contour overlap with Station WTTF-FM. It rationalizes that this contour overlap is acceptable because it is no greater than the contour overlap caused by the previous licensee for the Westerville allotment.

However, the Bureau fails to document the actual amount of overlap, if any, caused by the previous occupant of the Westerville allotment. Thus, the Bureau has absolutely no factual basis to assert that Ringer would cause no more overlap. The Bureau further ignores that the previous licensee operated omnidirectionally at 3,000 watts. Ringer proposes a directional 6,000 watt operation. Because Ringer is proposing an entirely different transmission system, the Bureau can not blithely assume that his proposed contours are the same as the previous licensee's.

The Bureau suggests that even if Ringer is in patent violation of Section 73.215, he could request processing under Section 73.213. However, the Bureau ignores the fact that Ringer's application explicitly requests processing under Section 73.215 and not under Section 73.213. Ringer could request such Section 73.213 processing only if he amended his application to delete the request for Section 73.215 processing. Such amendment must be accompanied, pursuant to Section 73.3522 (b), by a "good cause" showing, including a showing of lack of "foreseeability" for engineering matters.

The Bureau, at n. 1, of its opposition, contends that ORA "inaccurately" claimed that Ringer's application did not state that he would provide contour protection to other stations based on their maximum effective radiated power. However, the Bureau fails to cite to the portion of Ringer's application where it believes that he made a representation to provide such contour protection. Indeed, Ringer could make no such representation because of his admitted contour overlap with Station WTTF-FM.

The Bureau, in its opposition to the motion to enlarge against Ringer, at page 2, para. 3, also acknowledges that Davis and Wilburn will have contour overlap with Station WTTF-FM. In "plain English," this means actual interference! The public interest would not be served by the grant of applications which will cause actual interference to an existing station when other applications in this proceeding are in strict conformity with the mileage separation requirements of Section 73.207 and would cause no such interference.

Accordingly, appropriate issues must be specified against Ringer, Davis, and Wilburn. Even if these applicants are, pursuant to Section 73.213, technically eligible for a waiver of Section 73.207, compelling public interest considerations require denial of their applications because of the actual interference they will cause to Station WTTF-FM.

Section 73.207 Issues

ORA seeks the specification of short-spacing issues against the applications of Ringer, Davis, ASF, and Wilburn because they propose tower sites in violation of Section 73.207. In opposition, the Bureau contends that, because these applicants rely on processing under Sections 73.213 or 73.215, they do not need to be in compliance with Section 73.207. According to the Bureau, that provision is inapplicable to their applications.

The Bureau is wrong. In adopting Section 73.215, the Commission stated that directional antennas could be used only upon a showing that fully-spaced tower sites under Section 73.207 were unavailable and only in cases of necessity. MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991). Thus, Section 73.215 does not in any way eviscerate the necessity to show the unavailability of fully-spaced tower sites under Section 73.207. Moreover, Section 73.215 explicitly states that a public interest showing must be made in order to obtain permission to use a directional antenna.

The Bureau further makes the curious argument that with the adoption of Section 73.215, waivers of Section 73.207 would no longer be allowed. However, what the Commission actually did was to eliminate the granting of ad hoc and

individualized waivers under Section 73.207 in favor of standardized waiver procedures under Section 73.215. But regardless, the spacing requirements of Section 73.207 still exist and still must be complied with, absent special permission from the Commission. MM Docket No. 87-121, 6 FCC Rcd 5356, at 5360, para. 27.

The Bureau ignores the fact that the adoption of Section 73.213, and subsequent revisions, did not eviscerate the spacing requirements of Section 73.207. Section 73.213 is merely a standardized procedure to obtain, under certain special circumstances, a waiver of Section 73.207. See, Docket No. 14185, 40 FCC 868, 3 RR2d 1571, 1589, para. 38 (1964).

Section 73.315 Issue

ORA seeks the specification of a Section 73.315 issue against Wilburn because its application does not demonstrate at least 80% city-grade coverage to Westerville. In opposition, the Bureau asserts that a casual examination of a map of Wilburn's city-grade contours "suggests" more than adequate coverage.

The Bureau's opposition is an implicit admission that it has failed to do the required engineering analysis with respect to Wilburn's application. The Bureau has a duty and obligation to perform a pre-designation engineering analysis with respect to all applications as to city-grade coverage. See, Public Notice No. 4580, released May 16, 1985, item 4 (g), all applicable elements of FCC Form 301, including city-grade coverage, will be thoroughly examined by the Commission staff to determine compliance with Commission Rules.

If the Bureau had actually performed, as required, a thorough engineering analysis as to Wilburn's city-grade coverage, it would have been able to give a specific percentage of coverage, with supporting facts and analysis, rather than merely assert that a casual examination "suggests" more than adequate coverage. The Bureau is "winging it" with respect to its public interest duties and obligations.

In view of the fact that Wilburn's application and responsive pleadings fail to adequately demonstrate the required 80% city-grade coverage to

Westerville and the fact that the Bureau abdicated its pre-designation duty and obligation to thoroughly analyze the city-grade coverage proposal of Wilburn, a Section 73.315 issue must specified. It is contrary to the public interest to grant an application unless the required city-grade coverage is demonstrated. More than surmise must be shown.

Ex Parte Issue

ORA seeks the specification of an ex parte issue against Davis. In opposition, the Bureau observes that the Chief, Audio Services Divisions, ruled in the designation order that Davis' contacts with the staff did not violate the ex parte rules. However, the Bureau fails to note that ORA stated in its motion to enlarge that it was seeking the specification of an ex parte issue in order to perfect its appeal of the ruling of the Chief, Audio Services Division.

Conclusion

The oppositions of the Bureau must be disregarded as lacking any credibility. With respect to the Section 73.316 issues, it acknowledges that it is not following Commission Rules and policies. With respect to the Section 73.215 issues, it rationalizes actual interference to an existing station as somehow being in the public interest. With respect to the Section 73.207 issues, it egregiously misstates Commission policy by erroneously claiming that MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991), does not require a demonstration of no fully-spaced towers sites under Section 73.207. With respect to the Section 73.315 issue, it failed to perform a pre-designation engineering analysis of Wilburn's city-grade coverage, although required to do so by Commission policy. With respect to the ex parte issue, the Bureau is a participant to the alleged ex parte contacts and thus is not a disinterested party.

Had the Bureau been properly doing its job, there would have been no need for ORA to file the motions to enlarge the issues. The issues raised by the motions to enlarge all result from the fact that the Bureau improperly advised several of the applicants as to how to file their applications to specify a

short-spaced tower site. Rather than admit to this mistake, the Bureau has "circled its wagons" around the short-spaced applicants and has attempted to protect them from any application deficiency or challenge to their qualifications.

WHEREFORE, in view of the foregoing, ORA urges the Presiding Judge to disregard the oppositions of the Mass Media Bureau.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

Stephen T. Helverton

Attorneys for Ohio Radio

Associates, Inc.

1155 15th St., N.W., Suite 400

Washington, D.C. 20005

Tel. 202-659-3900

June 14, 1993

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 14th day of June, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Consolidated Replies to Oppositions of the Mass Media Bureau" to the following:

The Honorable Walter C. Miller*
Administrative Law Judge
Federal Communications Commission
Room 213
2000 L Street, N.W.
Washington, D.C. 20554

James Shook, Esquire
Hearing Branch
Federal Communications Commission
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

Arthur V. Belenduik, Esquire
Smithwick & Belenduik, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036
Counsel for David A. Ringer

James A. Koerner, Esquire
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003
Counsel for ASF Broadcasting Corp.

Eric S. Kravetz, Esquire
Brown, Finn & Nietert, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
Counsel for Wilburn Industries, Inc.

Dennis F. Begley, Esquire
Reddy, Begley & Martin
1001 22nd Street, N.W.
Washington, D.C. 20037
Counsel for Westerville Broadcasting Company
Limited Partnership

Dan J. Alpert, Esquire
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Shellee F. Davis


Stephen T. Yelverton

*Hand Delivery